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In the Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN R. BLANTON AND MARK D. FRALEY, PETITIONERS

v.

CITY OF NORTH LAS VEGAS, NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Sixth Amendment, as applied to the States through the Fourteenth Amendment, requires a jury trial for the offense of driving under the influence of alcohol, where the maximum penalty is a term of six months' imprisonment.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Constitution requires a jury trial for the offense of driving under the influence of alcohol (DUI), where the maximum penalty for the offense is a term of six months' imprisonment. Under the Assimilative Crimes Act, 18 U.S.C. 13, the United States prosecutes DUI and other offenses in violation of state law when those offenses are committed on federal enclaves. The United States takes the position in such cases that a jury trial is not required where, under applicable state law, the offense is punishable by a maximum term of six months' imprisonment or less and thus would be a "petty offense" as that term is used in the United States Code. See 18 U.S.C. 19; 18 U.S.C. (Supp. IV) 3581(b)(7), (8) and (9); Fed. R. Crim. P. 54(c); see also Rule 2(b)(6) of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates. In addi-

tion, the United States prosecutes a variety of petty offenses committed on property subject to the jurisdiction of the National Park Service. See, *e.g.*, 36 C.F.R. Pts. 1, 2, 3, 4, 5, 7, 12 and 13. Those offenses, which include DUI (see 36 C.F.R. 4.23(a)) and other traffic violations, carry penalties of no more than six months' imprisonment. See 36 C.F.R. 1.3.

The federal courts handle a huge number of petty offense cases each year. During the period June 30, 1986, to June 30, 1987, for example, United States magistrates disposed of 83,092 petty offenses, 56,763 of which were traffic offenses. Administrative Office of the United States Courts, *Annual Report of the Director*, Tables M-1A, M-2, at 393, 397 (1987). To extend the right to a trial by jury in even a small percentage of those cases would have a marked impact on the administration of justice in the federal system. Accordingly, the United States has a direct and substantial interest in the Court's resolution of the question presented in this case.

STATEMENT

1. In Nevada, driving under the influence of alcohol (DUI) is a misdemeanor punishable by a mandatory minimum term of two days' imprisonment and a maximum term of six months' imprisonment. Nev. Rev. Stat. Ann. § 484.3792.1(a)(2) (Michie Supp. 1988). The first offender must pay a mandatory minimum fine of $200 and may be fined a maximum of $1,000; the first offender must also attend, at his own expense, an alcohol abuse educational course (*id.* § 484.3792.1(a)(3) and (1)). Upon conviction, the first offender automatically loses his license for 90 days (*id.* § 483.460.1(c)). A state prosecutor may not dismiss a DUI charge in exchange for a guilty plea to a lesser charge or for any other reason, "unless he knows or it is obvious" that there is insufficient evidence

to prove the offense (*id.* § 484.3792.3). Courts may not suspend sentences or impose probation for DUI convictions (*ibid.*).[1]

On June 29, 1986, in North Las Vegas, Nevada, a police officer arrested petitioner Mark D. Fraley and charged him with a DUI offense in violation of Nev. Rev. Stat. Ann. § 484.379 (Michie 1986). After the North Las Vegas Municipal Court denied Fraley's demand for a jury trial, Fraley pleaded guilty. The court sentenced Fraley to five days' imprisonment and a $300 fine; the court also ordered Fraley to attend an alcohol abuse educational course. J.A. 1. On appeal, the Eighth Judicial District Court concluded that Nev. Rev. Stat. Ann. § 266.550 (Michie 1986) unconstitutionally deprived the North Las Vegas Municipal Court of the power to conduct a trial by jury (J.A. 27). The reviewing court therefore reversed Fraley's conviction and remanded the case to the North Las Vegas Municipal Court for a jury trial (J.A. 25-27).

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[1] If the court does not impose a mandatory prison term, the court must order the first offender "to perform 48 hours of work for the community while dressed in distinctive garb which identifies him as having [committed a DUI offense]." Nev. Rev. Stat. Ann. § 484.3792.1(a)(2) (Michie Supp. 1988).

A second DUI offense, also a misdemeanor, is punishable by a mandatory minimum term of ten days' imprisonment and a maximum term of six months' imprisonment. The second offender must also pay a mandatory minimum fine of $500 and may be fined a maximum of $1,000. Nev. Rev. Stat. Ann. § 484.3792.1(b) (Michie Supp. 1988). The second offender may also lose his license for one year (*id.* § 483.460.1(b)(5)). A third DUI offense is punishable by a mandatory minimum term of one year in prison and a maximum term of six years' imprisonment; the third offender must pay a mandatory minimum fine of $2,000, and may be fined a maximum of $5,000 (*id.* § 484.3792.1(c)). The third offender also loses his license for three years (*id.* § 483.460.1(a)(2)).

On July 18, 1986, also in North Las Vegas, a police officer arrested petitioner Melvin R. Blanton and charged him with a DUI offense. The North Las Vegas Municipal Court denied Blanton's demand for a jury trial. J.A. 18, 56. Blanton petitioned the Eighth Judicial District Court for a writ of mandamus. The court denied the petition. J.A. 20-21.

2. Blanton appealed to the Nevada Supreme Court from the order denying his petition for mandamus. In Fraley's case, respondent City of North Las Vegas filed an original petition for a writ of certiorari with that court. J.A. 21-23, 28-52. The court consolidated the cases along with several others that raised similar issues (J.A. 4-5).

The Nevada Supreme Court held that the Sixth Amendment, as applied to the States through the Fourteenth Amendment, does not require a jury trial for a DUI offense where the maximum penalty is a term of six months' imprisonment (Pet. App. 1-46).[2] Accordingly, the court remanded Fraley's case with instructions to reinstate the conviction and remanded Blanton's case with instructions to proceed without a jury trial (*id.* at 45-46).

The Nevada court noted that in *District of Columbia* v. *Colts*, 282 U.S. 63 (1930), this Court had looked to the nature of the offense as a guidepost for determining whether a particular offense required a jury trial. Nonetheless, the Nevada court read this Court's more recent decisions such as *Baldwin* v. *New York*, 399 U.S. 66

[2] The court found no state constitutional requirement for a jury trial, because "the right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution" (Pet. App. 16). The court also disposed of the state law issue raised in Fraley's case by concluding that the North Las Vegas Municipal Court has the authority, despite Nev. Rev. Stat. Ann. § 266.550 (Michie 1986), to conduct jury trials in DUI cases (Pet. App. 12-15).

(1970), and *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), as "retreat[ing] from [that] position * * * [toward] a more workable objective test based on the severity of the maximum possible penalty alone" (Pet. App. 22).

While acknowledging that its decision was in conflict with several federal court decisions,[3] the Nevada Supreme Court concluded that those decisions represented "an unnecessary and unwarranted expansion of the Supreme Court's holding in *Baldwin*," because "the collateral consequences of a conviction have not been a criterion relied upon in [its] recent decisions" (Pet. App. 31).[4] As the court explained (*id.* at 31-32):

> [T]he [Supreme] Court's references to "line drawing" in *Duncan* and *Baldwin*, and its increasing reliance upon the maximum punishment as the sole criterion for characterizing offenses as "serious" or "petty," suggest that only the maximum punishment for an offense need be examined to determine whether a jury trial is constitutionally mandated.

SUMMARY OF ARGUMENT

The Constitution provides a right to a jury trial for "all Crimes" (Art. III, § 2) and in "all criminal prosecutions" (Amend. VI). Those provisions, however, do not require

[3] In *United States* v. *Craner*, 652 F.2d 23 (9th Cir. 1981), and *Bronson* v. *Swinney*, 648 F. Supp. 1094 (D. Nev. 1986), the courts held that the nature of a DUI offense, together with the collateral consequences from a conviction, render that offense "serious" for purposes of the constitutional right to jury trial. In *Bronson*, the district court specifically held that the Nevada DUI offense must be tried to a jury (648 F. Supp. at 1098-1101).

[4] The court also identified certain "policy considerations" to support its ruling, such as the added expense of conducting jury trials in misdemeanor DUI cases and the fact that some municipal courts are staffed by nonlawyer judges (Pet. App. 33-42).

jury trials in all criminal cases. In accordance with the common law practice, this Court has long recognized that the constitutional right to a jury trial does not apply to petty offenses. Although the Court in several early decisions looked to the nature of a crime and its common law roots in determining whether the crime was sufficiently serious to require a trial by jury, the Court in more recent cases has focused on the maximum penalty provided for the offense as the principal criterion in determining whether the right to a jury trial attaches. That criterion remains the most reliable means of determining whether society regards a particular offense as sufficiently serious to trigger the right to a trial by jury.

The historical practice, which is reflected in the federal definition of a petty offense, 18 U.S.C. 19, 3581(b)(7)-(9), has been to provide jury trials only for those offenses that are punishable by more than six months' imprisonment. The Court has recognized the six-month maximum penalty as the appropriate constitutional dividing line between serious and petty offenses, and we submit that it is the proper constitutional test for determining when the right to a jury trial attaches. Only those offenses carrying maximum sentences in excess of six months' imprisonment must be tried to juries.

In Nevada, as in many States, a first DUI offense is punishable by a maximum of six months' imprisonment. In this case, the Nevada Supreme Court properly focused on the maximum punishment for a first DUI offense in concluding that the Constitution did not require that petitioners be accorded a jury trial. We agree that neither the inherent "nature" of an offense nor the collateral consequences of a conviction provide an accurate indicator of the seriousness of the offense for purposes of the constitutional jury trial guarantee. In addition, contrary to petitioners' assertion (Br. 17-18), current practices among the

States in providing jury trials for DUI offenses do not suggest the nature of DUI is such that the Constitution requires that DUI defendants be accorded a jury trial regardless of the maximum penalty provided for the offense under the applicable state law.

ARGUMENT

PETITIONERS WERE NOT ENTITLED TO A JURY TRIAL ON THE CHARGE THAT THEY WERE DRIVING UNDER THE INFLUENCE OF ALCOHOL

A. An Offense Punishable By A Maximum Term Of Six Months' Imprisonment Is A Petty Offense Triable Without A Jury

1. Article III, Section 2, of the Constitution provides that "[t]he Trial of all Crimes * * * shall be by jury." The Sixth Amendment similarly provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * *." Although the language is unqualified, those provisions have not been construed to require jury trials for all criminal offenses. Rather, the constitutional language has been "interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury." *Callan* v. *Wilson*, 127 U.S. 540, 549 (1888).

The English common law practice permitted a wide range of minor or petty criminal offenses to be resolved summarily before magistrates and justices of the peace without a jury, and that practice was generally followed in the American colonies. See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). As one 19th century American commentator explained:

> It is evident that a jury trial cannot be demanded in every case where a person is punished for a criminal

> offence. Such was not the practice at any time in the common law, and before the adoption of our Constitutions. * * * [T]here has always been a method for punishing offences of a minor grade, by inferior judicial officers * * * without a trial by jury; and * * * our Constitutions giving the right of a trial by jury, either expressly or impliedly, refer to this antecedent practice * * *.
>
> * * * If there be any general rule in common to all it is this: that in England, under the common law and various statutes, and here at the time of the adoption of our Constitutions, the trial of minor offences, such as * * * the punishment of intoxication, * * * and the punishment of the violation of laws and ordinances of local municipal bodies, was without a jury, before magistrates generally denominated justices of the peace.

J. Proffatt, *A Treatise on Trial by Jury* § 95, at 135-136 (1877 & photo. reprint 1986) (footnote omitted).

The initial draft of the jury trial guarantee in Article III used the term "criminal offenses." In place of that term, the Committee of Style substituted the term "crimes," which was understood at the time to denote "such offenses as are of a deeper and more atrocious dye." 4 W. Blackstone, *Commentaries on the Laws of England* 5 (1st American ed. 1772).[5] As the Court noted in *Schick* v.

[5] Available records of the Constitutional Convention of 1787 shed little light on the decision by the Committee of Style to substitute the term "criminal offences" for the word "crimes" in the final version of Article III. See 1 J. Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 149, 229, 270, 304 (2d ed. 1854) (Elliot's Debates); 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 144, 173, 187, 433, 438, 576 (rev. ed. 1966); 2 J. Madison, *The Debates in the Federal Convention of 1787*,

United States, 195 U.S. 65, 69-70 (1904), the use of the term "crimes" appears to confirm the Framers' intent to retain the practice of summary criminal prosecutions for petty offenses.[6]

2. The Constitution thus creates "the essential if not wholly satisfactory [task] * * * of determining the line between 'petty' and 'serious' [offenses] for purposes of the Sixth Amendment right to jury trial." *Baldwin* v. *New York*, 399 U.S. 66, 68 (1970) (plurality opinion). The Court's early decisions sought to resolve the question of the applicability of the jury trial right by focusing on the seriousness of the offense in question and whether that of-

at 344, 477 (G. Hunt & J. Scott eds. photo. reprint 1987). Addressing the Virginia Ratifying Convention in 1788, however, James Madison did state (3 Elliot's Debates 537 (emphasis in original)) that

> [t]he *trial by jury* is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time * * *. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary.

[6] The Court has consistently read the jury trial provisions of Article III and the Sixth Amendment as equivalent. *E.g.*, *Callan* v. *Wilson*, 127 U.S. at 549-550. The Sixth Amendment right to jury trial for serious criminal offenses applies to the States through the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145, 157-158 (1968).

The Court has addressed the apparent inconsistency between its treatment of the constitutional jury trial guarantee and other constitutional protections applicable to criminal prosecutions. In *Argersinger* v. *Hamlin*, 407 U.S. 25, 30, 31 (1972) (footnote omitted), the Court, on the basis of the "historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' " rejected the argument "that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." The Court also made clear that other Sixth Amendment protections, such as the right to a public trial and the right to confront witnesses, have historically not been limited to felonies or serious offenses (*id.* at 28).

fense or an analogous one was triable to a jury at common law. The Court's more recent decisions, however, have discarded the case-by-case effort to assess the seriousness of an offense or its treatment at common law, in favor of a simpler and more objective test focusing on the maximum penalty that the offense carries. The latter inquiry, we submit, is the proper means of determining whether the Constitution requires that an offense be tried to a jury.

In *Callan* v. *Wilson, supra,* the defendant, a union musician, was convicted after a bench trial of conspiring to prevent certain nonunion musicians from working. The defendant refused to pay a $25 fine and was sentenced to 30 days' imprisonment. 127 U.S. at 540-542. In determining whether the defendant was entitled to a jury trial, the Court looked only to "the nature of the crime of conspiracy at common law" (*id.* at 556). Finding that conspiracy "is by no means a petty or trivial offence" (*id.* at 555), but instead "is an offence of a grave character" (*id.* at 556), the Court concluded that the offense must be tried to a jury.

In *District of Columbia* v. *Colts,* 282 U.S. 63 (1930), the Court followed a similar line of analysis. The defendant in the *Colts* case was charged with the crime of driving recklessly so as to endanger people, an offense that was punishable by a maximum of 30 days' imprisonment. Focusing "primarily upon the nature of the offense," the Court held that the defendant was entitled to a jury trial for two reasons: first, the offense "in its very nature is *malum in se* * * * [and] was an indictable offense at common law"; and second, driving recklessly so as to endanger people "is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense" (*id.* at 73 (emphasis in original)).

Since the decisions in *Callan* and *Colts,* the Court has moved away from the approach used in those cases. In

light of the difficulty of finding common law analogues for many modern day offenses, the Court has abandoned the effort to determine whether a particular offense would have been indictable at common law. In addition, rather than attempting to determine in the abstract whether a particular offense was of sufficient "depravity" to be deemed serious, the Court has looked to the penalty imposed for the offense. Under that approach, the Court has looked to the size of the penalty as the best measure of the seriousness of the offense as the legislature viewed it, and thus as the determining factor in deciding whether the offense carries with it a right to trial by jury.

The penalty-oriented approach had its origins as early as 1904 in *Schick* v. *United States, supra.* There, the defendant was convicted summarily of selling unstamped oleomargarine in violation of a federal revenue statute and was ordered to pay a $50 fine. The Court concluded that the crime charged was a petty offense because "[s]o small a penalty * * * indicates * * * [i]t is not one necessarily involving any moral delinquency" (195 U.S. at 67). As the Court explained, the nature of the offense, and in particular "the amount of the punishment prescribed" determine "whether it is to be classed among serious or petty offenses" (*id.* at 68).

Subsequently, in *District of Columbia* v. *Clawans,* 300 U.S. 617, 625 (1937), the Court again refused to rely exclusively on the common law treatment of the offense, but instead considered the severity of the penalty in determining whether a statutory offense "must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial." Such an inquiry, the Court noted, involves an "objective standard[]" that may be "taken as a gauge of [the community's] social and ethical judgments" (*id.* at 628).

The defendant in *Clawans* was convicted of unlawfully selling unused portions of railway tickets, an offense punishable by a maximum sentence of 90 days' imprisonment (300 U.S. at 623). Reviewing practices among the Colonies and the States in the late 18th century, the Court found numerous examples of summary disposition of petty offenses with punishments exceeding three months' imprisonment (*id.* at 625-630). The Court then concluded that a penalty of that size, "when attached to the offense of selling second-hand goods without a license," did not give the crime "the character of * * * a major offense" (*id.* at 630).

By stating that the severity of the penalty was a principal factor in the constitutional inquiry, the *Clawans* Court foreshadowed the approach the Court has embraced during the past 20 years. In keeping with the trend toward an objective standard, the Court in *Clawans* observed that the question of a defendant's right to jury trial "must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments" (300 U.S. at 628).[7]

More recent decisions, following the approach used in *Clawans,* have focused on the maximum penalty for an offense as the proper criterion for determining whether the right to a jury trial attaches. A series of three cases decided

[7] In a statement further anticipating the six-month penalty that the Court ultimately settled on as the appropriate dividing line between serious and petty offenses, the Court observed in *Clawans* (300 U.S. at 627-628 (footnote omitted)) that

> we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much.

in 1968 and 1969 have become the leading authorities for that point.

In *Duncan* v. *Louisiana,* 391 U.S. 145, 159 (1968), the Court made clear that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not." The Court noted that petty offenses were tried without juries in England and the Colonies "and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions" (*id.* at 160). There is no evidence that the Framers intended to depart from that practice, the Court observed.

In determining whether a particular offense was "petty" or "serious" for jury trial purposes, the *Duncan* Court emphasized that it was important to use "objective criteria" (391 U.S. at 161) to make the constitutional determination. Furthermore, the court noted that "[t]he penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments' * * * of the crime in question" (*id.* at 160 (citation omitted)). While not deciding precisely where the line should be drawn between petty offenses and serious crimes, the Court concluded that a crime carrying a potential penalty of two years' imprisonment is a serious crime and not a petty offense.

Frank v. *United States,* 395 U.S. 147 (1969), which was decided the year after *Duncan,* made the same point. As in *Duncan,* the Court in *Frank* explained that in determining whether the jury trial right attached in a prosecution for a particular crime, the Court sought "objective indications of the seriousness with which society regards [an] offense" and that "[t]he most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission" (*id.* at 148). Although *Frank* was a contempt case in which there was no statutory

maximum penalty, the Court noted that in "ordinary criminal prosecutions, the severity of the penalty authorized * * * is the relevant criterion" for distinguishing between petty and serious offenses (*id.* at 149). In such cases, the Court explained, "the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense" (*ibid.*).

Finally, in *Baldwin* v. *New York*, 399 U.S. 66 (1970), which was decided the following year, a plurality of the Court announced a standard that it distilled from prior precedents.[8] The Court stated that it looked to "objective criteria reflecting the seriousness with which society regards the offense * * * [and] found the most relevant such criteria in the severity of the maximum authorized penalty."[9] Indeed, the Court referred to the maximum

[8] Three Justices joined the plurality opinion. Justices Black and Douglas concurred in the judgment but did not agree that the Constitution permits petty offenses to be tried without a jury. Chief Justice Burger and Justices Harlan and Stewart dissented on the ground that the incorporation doctrine should not be invoked to apply the jury trial requirements of the Constitution in full force to the States. See 399 U.S. at 76-77 (Burger, C.J., dissenting); *id.* at 117-143 (Harlan, J., dissenting); *id.* at 143-145 (Stewart, J., dissenting). Justice Harlan and apparently Justice Stewart agreed with the plurality, however, that for federal purposes the six-month period of imprisonment was the appropriate dividing line between serious and petty crimes. See 399 U.S. at 120-121 (Harlan, J., dissenting); *id.* at 143 (Stewart, J., dissenting). Accordingly, five Members of the Court agreed on the six-month period of imprisonment as the correct point at which the constitutional right to a jury trial should attach. For that reason, we refer to the plurality's reasoning on that point as setting forth the view of the Court.

[9] Cf. *Welsh* v. *Wisconsin*, 466 U.S. 740, 754 n.14 (1984) ("Given that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.").

penalty as "the only objective criterion by which a line could ever be drawn * * * between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.* at 68, 72-73 (footnote omitted).[10]

3. At the same time that it was settling on the maximum penalty as the sole criterion for determining whether a jury trial is required, the Court established a "bright line" test to distinguish petty from serious crimes for purposes of the jury trial guarantee. The Court has concluded that crimes "carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty offenses." *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 512 (1974); see *id.* at 519 (Marshall, J., concurring). That constitutional dividing line,

[10] The Court has followed a roughly similar line of analysis in cases involving contempts of court. In *United States* v. *Barnett*, 376 U.S. 681, 682-683 (1964), which was decided several years before *Duncan*, the Court held that criminal contempt is a petty offense that need not be tried to a jury. In dictum, the Court noted that "our cases have indicated that, irrespective of the severity of the offense, the severity of the penalty imposed * * * might entitle a defendant to the benefit of a jury trial" (*id.* at 695 n.12 (citing *District of Columbia* v. *Clawans*, *supra*)). Justice Clark, writing for the Court, added (*ibid.*) that "[s]ome members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." Two years later, in *Cheff* v. *Schnackenberg*, 384 U.S. 373, 379 (1966), a plurality of the Court followed *Barnett* to hold that an individual who received a six-month sentence for criminal contempt was not entitled to a jury trial. The plurality reasoned that a jury trial was not required because the sentence fell within the range Congress prescribed for petty offenses and the nature of a criminal contempt offense did not call for different treatment (*id.* at 379-380). The Court subsequently held that a jury trial was required in contempt cases in which penalties of more than six months' imprisonment were imposed. See *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 220 (1968).

although necessarily somewhat arbitrary (see *Baldwin*, 399 U.S. at 73; *Duncan*, 391 U.S. at 160-161) has a sound historical basis and is consistent with contemporary standards. As the Court has noted, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term." *Duncan* v. *Louisiana*, 391 U.S. at 161; see *Baldwin* v. *New York*, 399 U.S. at 71; *District of Columbia* v. *Clawans*, 300 U.S. at 626-627. At the time of *Duncan*, even in the absence of any constitutional compulsion the States were nearly unanimous in the view that offenses punishable by more than six months' imprisonment should be tried to juries. See *Duncan* v. *Louisiana*, 391 U.S. at 161 & n.33; *Baldwin* v. *New York*, 339 U.S. at 71-72. And in the federal system, Congress has consistently defined as petty any offense punishable by no more than six months' imprisonment.[11] It is thus clear from this Court's precedents, as well as historical and contemporary practice, that a defendant has a right to a jury trial for any offense carrying a maximum penalty of more than six months' imprisonment, but he does not have a right to a jury trial for an offense carrying a maximum penalty of six months' imprisonment or less.

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[11] See, *e.g.*, 18 U.S.C. (1982 ed.) 1(3); 18 U.S.C. 19; 18 U.S.C. (Supp. IV) 3581(b)(7), (8) and (9).

In the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76-77, Congress vested district courts with exclusive jurisdiction over "all crimes and offences * * * cognizable under the authority of the United States, * * * where no other punishment than whipping * * * a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Congress specifically provided (*id.* at 77) that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Congress enacted no such provision for the trial of "crimes and offences" in which the maximum penalty was six months or less and which were tried in the district courts.

B. A DUI Offense, Punishable By A Maximum Term Of Six Months' Imprisonment, Should Be Treated As A Petty Offense Triable Without A Jury

The application of these principles to this case is straightforward. The Nevada DUI law provides for a maximum of six months' imprisonment for first offenders such as petitioners. Therefore, petitioners are not constitutionally entitled to a jury trial. If there were any doubt of the application of those principles in the context of a DUI offense, the Court just two Terms ago reaffirmed the vitality of the six-month constitutional dividing line for purposes of the right to a jury trial, and it did so in the context of a DUI prosecution. In *Bairnsfather* v. *Louisiana*, No. 86-5656 (Apr. 6, 1987), the appellant challenged the Louisiana courts' refusal to grant him a jury trial for a DUI offense. Although the DUI offense carried a maximum penalty of only six months' imprisonment, the appellant argued that the crime was a serious offense for constitutional purposes, because of the nature of the offense and the collateral consequences that a defendant could suffer upon conviction. See 86-5656 J.S. 8-9. The Court, however, dismissed the appeal in that case for want of a substantial federal question. That precedent is directly applicable here and should be dispositive.[12]

Petitioners contend that the nature of the DUI offense (Br. 18-22), as well as the collateral consequences of a conviction (Br. 9-16), render the Nevada DUI offense sufficiently serious to require a jury trial in spite of the six-

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[12] The Court's dismissal for want of a substantial federal question represents a decision on the merits and therefore has precedential value, albeit less value than an opinion of the Court after full briefing and argument. See, *e.g.*, *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979); *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975).

month cap on the authorized penalty. Moreover, petitioners suggest (Br. 17-18) that current state practices regarding jury trials for DUI offenses confirm that DUI offenses should be tried to a jury. The Court's decisions, however, show that neither the inherent nature of an offense nor its collateral consequences are an accurate indicator of its seriousness for purposes of the constitutional jury trial guarantee. And, contrary to petitioners' suggestion, most States treat DUI as a petty offense and do not regard it as an offense that requires a trial by jury as a constitutional matter.

1. As even petitioners concede (Br. 21), the Court has all but explicitly abandoned its inquiry, last announced in *District of Columbia* v. *Colts, supra,* into an offense's common law pedigree. That inquiry would be fruitless in the case of modern statutory offenses that were unknown to the common law, and even if a common law analogue could be found, the treatment of the analogous offense at common law would not necessarily shed light on whether society now considers the offense sufficiently serious to warrant a trial by jury.[13]

Any inquiry into the "nature of an offense," without regard to the maximum penalty attached, would be equally

[13] This case demonstrates the difficulty (and ultimate futility) of looking to the treatment of a given offense at common law. The closest common law analogue to DUI presumably would have been driving a wagon or horsecart while drunk. Available authority suggests that that offense, as opposed to reckless driving so as to endanger others, the offense that was at issue in *Colts,* was not an indictable offense at common law. See, *e.g., State* v. *Rodgers,* 91 N.J.L. 212, 102 A. 433 (1917). Yet the historical analogy obviously does not speak very clearly to the question whether the offense of DUI is sufficiently serious to warrant trial by jury. Instead, as we set out above, it is the legislature's assignment of a penalty that is the most accurate gauge of the seriousness of an offense.

uninformative, as it would inevitably call for subjective evaluations by the courts as to the culpability of particular conduct. To attempt to divine the "nature of the offense" would thus violate this Court's instruction that the constitutional inquiry should be based on objective criteria. *E.g., Baldwin* v. *New York,* 399 U.S. at 68; *Frank* v. *United States,* 395 U.S. at 148; *Duncan* v. *Louisiana,* 391 U.S. at 161; *District of Columbia* v. *Clawans,* 300 U.S. at 628. In addition, it would disregard the "most relevant indication of the seriousness of an offense" (*Frank* v. *United States,* 395 U.S. at 148)—the legislature's assignment of a particular penalty to the crime.

We do not doubt that DUI may be "an act repugnant to the moral sense of the community" (Br. 22); See *Welsh* v. *Wisconsin,* 466 U.S. at 755 (Blackmun, J., concurring). Indeed, the same judgment should hold true for any criminal offense that is punishable by imprisonment, even for a relatively short term. If the repugnancy of the conduct were the test, however, any criminal act more serious than a minor infraction would give rise to a jury trial right. And, in any event, if a court's sense of moral repugnance were the test, there would be no hope of obtaining certainty and predictability in determining what offenses must be tried to a jury. The open-ended and subjective standard advocated by petitioners would ignore the legislature's choice and could convert almost any criminal offense into one requiring a jury trial, a result the Court long ago held the Constitution did not require.

Looking to the collateral consequences from a conviction to determine the offense's seriousness, as petitioners suggest (Br. 9-16), would run a similar risk of permitting subjective determinations to control the right to a jury trial. Conviction for any crime has collateral consequences, yet the Court has never stated that those consequences define the seriousness of an offense. Instead, the

Court in *Duncan* v. *Louisiana*, 391 U.S. at 160, has made clear that

> the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.

Accord *Baldwin* v. *New York*, 339 U.S. at 73. There is simply no ascertainable standard by which a court could reasonably distinguish the collateral consequences resulting from a DUI conviction from those resulting from other petty offenses to the extent necessary to justify a constitutional difference for purposes of the jury trial guarantee. See *Landry* v. *Hoepfner*, 840 F.2d 1201, 1216 (5th Cir. 1988) (en banc), petition for cert. pending, No. 88-5043. Many traffic violations can result in the suspension or loss of a driver's license or compulsory attendance at safe driving schools. Moreover, the opprobrium attached to driving while intoxicated would be difficult to distinguish, for constitutional purposes, from the opprobrium attached to other petty offenses such as public intoxication or engaging in various forms of disorderly conduct.

2. Most state and federal courts that have addressed the issue have held that an offense such as DUI, when it carries a penalty of no more than six months' imprisonment, does not require a jury trial. For example, the en banc Fifth Circuit recently held that a DUI offense under Louisiana law was a petty offense, triable without a jury, because the maximum potential penalty was six months' imprisonment. *Landry* v. *Hoepfner*, *supra*. The court, thoroughly analyzing this Court's decisions, explicitly rejected arguments that the nature of the DUI offense itself or the collateral consequences resulting from a conviction

elevated the offense to a "serious" crime for purposes of the Sixth and Fourteenth Amendments (840 F.2d at 1210-1217). See also *United States* v. *Jenkins*, 780 F.2d 472, 474 (4th Cir.), cert. denied, 476 U.S. 1161 (1986); *United States* v. *Fletcher*, 505 F. Supp. 1053, 1054 (W.D. Va. 1981); *Matos* v. *Rodriguez*, 440 F. Supp. 673, 676-677 (D.P.R. 1976); *Thomas* v. *State*, 331 A.2d 147 (Del. 1975); *State* v. *Henderson*, 491 So. 2d 647, 650 (La. 1986); *State* v. *Smith*, 99 Nev. 806, 810, 672 P.2d 631, 634 (1983); *State* v. *Morrill*, 123 N.H. 707, 709-713, 465 A.2d 882, 884-886 (1983); *State* v. *Linnehan*, 197 N.J. Super. 41, 43-44, 484 A.2d 34, 35 (App. Div. 1984), cert. denied, 99 N.J. 236, 491 A.2d 723 (1985); *State* v. *Sweat*, 78 N.M. 512, 513-514, 433 P.2d 229, 230-231 (1967); *Commonwealth* v. *Fischl*, 363 Pa. Super. 173, 177-180, 525 A.2d 775, 777-778 (1987); *State* v. *Holliday*, 109 R.I. 93, 280 A.2d 333 (1971).

Four federal courts and three state courts have concluded that the Constitution requires that DUI defendants be accorded a trial by jury even where the offense carries a maximum penalty of six months or less. See *United States* v. *Craner*, 652 F.2d 23 (9th Cir. 1981); *Bronson* v. *Swinney*, 648 F. Supp. 1094 (D. Nev. 1986); *United States* v. *Woods*, 450 F. Supp. 1335 (D. Md. 1978); *Brady* v. *Blair*, 427 F. Supp. 5 (S.D. Ohio 1976); *Rothweiler* v. *Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966); *State* v. *O'Brien*, 68 Haw. 39, 704 P.2d 883 (1985); *City of Casper* v. *Cheatham*, 739 P.2d 1222 (Wyo. 1987). Those courts have generally relied on the collateral consequences of a DUI conviction as the reason for holding the jury trial right applicable. That approach to the constitutional issue, however, is inconsistent with the analysis in this Court's decisions, as we have discussed above.

Nor are those courts' other justifications for requiring jury trials in DUI cases convincing. The district court in *Bronson* v. *Swinney*, *supra*, which required that Nevada

provide a jury trial in DUI cases, based its ruling in part on the fact that the Nevada DUI statute has a mandatory minimum two-day jail sentence. See 648 F. Supp. at 1098-1100. The presence of a minimum sentence, however, does not suffice to convert DUI into a "serious" offense for constitutional purposes. This Court has never looked to the minimum sentence as a factor in determining whether the right to a jury trial attaches. Indeed, even in contempt cases, where the actual sentence imposed determines whether the accused must have a jury trial, the Court has emphasized that a sentence of no more than six months' imprisonment does not require a trial by jury. *E.g., Muniz* v. *Hoffman,* 422 U.S. 454, 475-476 (1975); *Codispoti* v. *Pennsylvania,* 418 U.S. 506, 511-512 (1974). Consequently, a mandatory two-day jail sentence cannot transform an otherwise petty offense into one that must be tried to a jury.[14]

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[14] We also disagree with the Ninth Circuit's decision in *Craner*, in which that court based its ruling in part on the fact that the penalty for DUI on national park lands was set by the Secretary of the Interior rather than by Congress. From the fact that the offense and its penalty were defined by regulation rather than by statute, the court concluded that the size of the penalty is less important because it does not reflect a legislative judgment that DUI offense on national park grounds is a petty offense. The regulations themselves, however, demonstrate the flaw in that approach. Congress has authorized penalties of up to six months' imprisonment and a $500 fine for regulatory violations in the national parks, 16 U.S.C. 3, three months' imprisonment and a $100 fine for regulatory violations in national military parks and battlefields, 16 U.S.C. 9a, and no imprisonment but a $500 fine for regulatory violations in national historic sites, 16 U.S.C. 462(k). If the *Craner* court is correct, the fact that Congress did not define the crime would require a DUI offense on a national historic site to be tried to a jury even though the offense carried no risk of punishment and a maximum fine of only $500. By extrapolation, the *Craner* court would apparently require a trial by jury even if the maximum penalty were a $15 fine.

A review of current practices among the States, including the District of Columbia, regarding the right to jury trial for a DUI offense shows that 30 jurisdictions have penalties of no more than six months' imprisonment for a first DUI offense.[15] Twenty-two of those States provide for a jury trial in DUI cases, but only two do so solely because they view DUI as a "serious" offense for constitutional purposes despite its petty offense penalty. See *Rothweiler* v. *Superior Court,* 100 Ariz. 37, 41-47, 410 P.2d 479, 483-486 (1966); *State* v. *O'Brien,* 68 Haw. 39, 41-43, 704 P.2d 883, 885-887 (1985).[16] The other 20 States

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[15] The Fifth Circuit, in *Landry* v. *Hoepfner, supra,* recently conducted such a review. See 840 F.2d at 1218-1220. The Fifth Circuit included Puerto Rico in its analysis, but we have chosen to include only the 50 States and the District of Columbia. Petitioners have attached to their brief an appendix that assertedly contains a list of the States that provide jury trials for a DUI offense (Br. App. 1-9). That list is deceptive, however, because it does not show the number of jurisdictions that provide for a jury trial for all criminal offenses, and we disagree with petitioners' analysis with respect to several States. We are attaching as an appendix to this brief a list of how each State, including the District of Columbia, treats DUI offenses.

The *Landry* court's categorization rested on an appendix that we had submitted. See 840 F.2d at 1218 & n.32. We provided incorrect information with respect to Connecticut and Pennsylvania, so the actual breakdown of the States varies slightly from that in *Landry*.

[16] The Wyoming Supreme Court recently held that DUI was a "serious" offense, for constitutional purposes, and that it therefore required a jury trial in a municipal court, even though the applicable local ordinance provided for no penalty of imprisonment. *City of Casper* v. *Cheatham,* 739 P.2d 1222, 1223-1224 (Wyo. 1987). That court, however, already had held that under Wyoming law a defendant had a right to jury trial in any cases where the penalty involved a potential term of imprisonment. *Brenner* v. *City of Casper,* 723 P.2d 558, 561 (Wyo. 1986). Courts in Maryland and South Dakota also have held that a DUI offense is serious. In both States, however, the penalty for DUI is one year in prison. Thus, a defendant would have a right to a

grant a jury trial in all criminal cases or in all cases that carry a potential penalty of imprisonment.[17] Eight jurisdictions, including Nevada, with punishments for DUI not exceeding six months' imprisonment, do not provide for a jury trial.[18]

In the remaining 21 States, the maximum penalty for DUI exceeds six months' imprisonment.[19] Hence, coupled with Arizona, Hawaii, and Wyoming, a total of 24 states consider DUI to be a "serious" offense, for constitutional purposes, while 27 jurisdictions deem DUI to be a petty offense. See App., *infra,* 1a, 5a, 20a; see also 840 F.2d at 1219. As the Fifth Circuit observed (*ibid.*), that ratio "reflects that a clear majority of the jurisdictions * * * classifies [DUI] in a manner which entirely meets the standards of the Supreme Court's definition of 'petty.' " Accordingly, the practice among the States does not support a conclusion that a DUI charge warrants a jury trial when the maximum sentence is six months' imprisonment.

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jury trial irrespective of those decisions. See *Fisher* v. *State,* 305 Md. 357, 504 A.2d 626 (1986); *Parham* v. *Municipal Court,* 86 S.D. 531, 199 N.W.2d 501 (1972); see also App., *infra,* 8a, 17a. By contrast, courts in Florida and Nebraska, States that provide for a jury trial in virtually all criminal cases, have held that a DUI offense does not intrinsically require a jury trial. See *Whirley* v. *State,* 450 So.2d 836 (Fla. 1984); *State* v. *Amick,* 173 Neb. 770, 114 N.W.2d 893 (1962).

[17] California, Connecticut, Florida, Idaho, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, Ohio, Oregon, South Carolina, Utah, West Virginia, Wisconsin, and Wyoming all provide either by state constitution or statute for a jury trial in all criminal cases or in all prosecutions involving potential imprisonment. See App., *infra,* 2a-20a.

[18] Those jurisdictions are Delaware, the District of Columbia, Louisiana, Nevada, New Hampshire, New Jersey, New Mexico, and North Dakota. See App., *infra,* 3a-4a, 7a, 11a-14a.

[19] Eleven of those States also provide for jury trial in all criminal cases. Those States include Alaska, Colorado, Illinois, Indiana, Iowa, Maine, Oklahoma, Tennessee, Texas, Vermont, and Washington. See App., *infra,* 1a-2a, 6a, 8a, 15a, 17a-19a.

3. Finally, we submit that the constitutional dividing line that the Court has established has the virtues of predictability and ease of application for the parties. When the jury trial right is conditioned on the length of the potential sentence for an offense, the trial court and the parties know in advance whether a jury trial is required. On the other hand, if a trial court must determine the seriousness of minor offenses on a case-by-case basis, the administration of justice obviously will suffer. The confusion wrought by such a test, requiring either an examination of the nature of the offense or its collateral consequences, will no doubt be immense. The burden is particularly great because it is imposed in a class of cases in which the need for easily applied rules and simplified handling is the greatest. The Court's "fixed dividing line between petty and serious offenses" (*Codispoti* v. *Pennsylvania,* 418 U.S. at 512) remains historically sound, easy to apply, and consistent with contemporary standards. The Court should therefore reaffirm the vitality of that standard for determining whether an offense requires a jury trial.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
LOUIS M. FISCHER
Attorney

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APPENDIX

PENALTIES FOR FIRST OFFENSE DUI AND RIGHT TO JURY TRIAL IN THE STATES AND THE DISTRICT OF COLUMBIA

ALABAMA	Under Ala. Code § 32-5A-191 (Supp. 1987), the maximum penalty is one year in prison and a $1,000 fine. The state right to jury trial applies only to those classes of cases triable to a jury at common law. *Ex parte LeFlore,* 445 So.2d 932, 934 (Ala. 1983).
ALASKA	Under Alaska Stat. §§ 28.35.030 (b), 12.55.035(b)(3), and 12.55.135(a) (1984), the maximum penalty is one year in prison and a $5,000 fine. The state right to jury trial applies to all offenses punishable by imprisonment. *Baker* v. *City of Fairbanks,* 471 P.2d 386, 401-402 (Alaska 1970).
ARIZONA	Under Ariz. Rev. Stat. Ann. §§ 28-692.01.B, 13-707.A.1, and 13-802.A (1976 & 1978), the maximum penalty is six months' imprisonment and a $1,000 fine. *In Rothweiler* v. *Superior Court,* 100 Ariz. 37, 41-47, 410 P.2d

479, 483-486 (1966), the state supreme court held that DUI was a serious offense that required trial by jury.

ARKANSAS

Under Ark. Stat. Ann. §§5-65-103, 5-65-111(a), and 5-65-112(1) (1987), the maximum penalty is one year in prison and a $1,000 fine.

The state right to jury trial applies only to those classes of cases triable to a jury at common law. *Dunn* v. *Davis,* 725 S.W.2d 853, 855 (Ark. 1987).

CALIFORNIA

Under Cal. Veh. Code §§ 23152 and 23160(a) and Cal. Penal Code § 689 (West 1985), the maximum penalty is six months' imprisonment and a $1,000 fine.

There is a state constitutional right to jury trial for all misdemeanors, including DUI, even though the misdemeanor would be a petty offense under federal law. *Mills* v. *Municipal Court,* 10 Cal.3d 288, 298 & n.8, 515 P.2d 273, 280 & n.8 (1973).

COLORADO

Under Colo. Rev. Stat. §§ 42-4-1202(1)(a) and (4)(a)(I) (19xx), the maximum penalty is one year

in prison and a $1,000 fine.

The state extends the opportunity for a jury trial to all criminal cases. *City of Canon City* v. *Merris,* 137 Colo. 169, 181-182, 323 P.2d 614, 620-621 (1958).

CONNECTICUT

Under Conn. Gen. Stat. §§ 14-227a(a) and (h) (1987), the maximum penalty is six months' imprisonment and a $500 fine.

The state right to jury trial applies to all criminal offenses, except those where the maximum penalty is a $199 fine. See Conn. Gen. Stat. § 54-82b (Supp. 1988).

DELAWARE

Under Del. Code Ann. tit. 21, §§ 4177(a) and (d)(1) (1985), the maximum penalty is six months' imprisonment and a $1,000 fine.

Contrary to the representation in the appendix to petitioners' brief, the Delaware Supreme Court has held that the right to jury trial applies only to "serious" offenses, both in the first instance (*Van Arsdall* v. *State,* 524 A.2d 3, 9 n.11 (Del. 1987)), and on appeal de novo (*Clements* v. *Family Court,* 401 A.2d 72, 74 (Del. 1979)). A

	serious offense is punishable by more than six months' imprisonment. *Thomas* v. *State,* 331 A.2d 147, 150 (Del. 1975) (applying the *Baldwin* test and overruling the prior state rule that trial by jury is required when the offense carries a punishment of three months' imprisonment).
DISTRICT OF COLUMBIA	Under 40 D.C. Code Ann. § 716(b)(1), the maximum penalty is 90 days' imprisonment and a $300 fine. The District of Columbia courts follow the Court's precedents; the D.C. Court of Appeals has not recognized a constitutional right to jury trial for an offense punishable by no more than six months' imprisonment. By statute, an accused may demand a jury trial where the offense's penalty exceeds 90 days' imprisonment. See *Jackson* v. *United States,* 498 A.2d 185, 187-188 (D.C. 1985).
FLORIDA	Under Fla. Stat. §§ 316.193(1)(a) and (2)(a) (Supp. 1988), the maximum penalty is six months' imprisonment and a $500 fine. The state extends the opportunity for a jury trial to all traffic offenses, including DUI. Fla. Stat. § 316.1934(4) (Supp. 1988).

GEORGIA	Under Ga. Code Ann. §§ 40-6-391(a), 40-6-391(c)(1)(A), and 40-6-391(c)(1)(B) (Supp. 1988), the maximum penalty is one year in prison and a $1,000 fine. Georgia does not recognize a state right to jury trial for petty offenses. *Key* v. *Stewart,* 228 Ga. 516, 517, 186 S.E.2d 739, 740 (1972).
HAWAII	Under Haw. Rev. Stat. §§ 291-4(a) and (b)(1)(C) (1985), the maximum penalty is six months' imprisonment. In *State* v. *O'Brien,* 68 Haw. 39, 41-43, 704 P.2d 883, 885-887 (1985), the state supreme court held that DUI was a serious offense that required trial by jury.
IDAHO	Under Idaho Code §§ 18-8004(1), 18-8005(1)(a), and 18-8005(1)(b) (Supp. 1988), the maximum penalty is six months' imprisonment and a $1,000 fine. The state right to jury trial applies to all criminal offenses, except those not punishable by imprisonment or those punishable

by no more than a $100 fine. See Idaho Code § 19-1902 (1987).

ILLINOIS

Under Ill. Rev. Stat. ch. 95½, paras. 11-501(a) and (c) (Supp. 1988), and ch. 38, para. 1005-1-14 (1982), the maximum penalty is one year in prison.

The state right to jury trial applies to all criminal offenses, including a traffic speeding violation. See Ill. Rev. Stat. ch. 38, paras. 103-6 and 102-15 (1980); *People* v. *Beil,* 76 Ill. App. 3d 924, 927-928, 395 N.E.2d 400, 402-403 (1979).

INDIANA

Under Ind. Code §§ 9-11-2-2 and 35-50-3-2 (1987), the maximum penalty is one year in prison and a $5,000 fine.

The state constitutional right to jury trial applies to all criminal offenses. *Gillespie* v. *Gilmore,* 307 N.E.2d 480, 482-483 (1974).

IOWA

Under Iowa Code §§ 321J.2.1.a, 321J.2.2.a, and 903.1.1.b (Supp. 1988), the maximum penalty is one year in prison and a $1,000 fine.

The state constitutional right to jury trial applies to all criminal offenses. *State* v. *Henderson,*

287 N.W.2d 583, 584-585 (Iowa 1980).

KANSAS

Under Kan. Stat. Ann. §§ 8-1567(a) and (c) (1982), the maximum penalty is six months' imprisonment and a $500 fine.

The state right to jury trial applies, on demand, to all misdemeanor and traffic offenses. See Kan. Stat. Ann. § 22-3404 (1981); *State* v. *Dickson,* 680 P.2d 313 (Kan. 1984).

KENTUCKY

Under Ky. Rev. Stat. Ann. §§ 189A.010(1) and (2)(A) (Michie/Bobbs-Merrill Supp. 1986), the maximum penalty is 30 days' imprisonment and a $500 fine.

The state right to jury trial applies to "all criminal prosecutions, including prosecutions for violation of traffic laws" (Ky. Rev. Stat. Ann. § 29A.270(1) (Michie/Bobbs-Merrill 1985)).

LOUISIANA

Under La. Rev. Stat. Ann. §§ 14:98(A) and (B) (West 1986), the maximum penalty is six months' imprisonment and a $500 fine.

The state right to jury trial applies to those offenses with penalties exceeding six months' imprisonment or a $500 fine. See *State* v. *Henderson*, 491 So.2d 647 (La. 1985).

MAINE

Under Me. Rev. Stat. Ann. tit. 29, §§ 1312-B.1, 1312-B.2, and tit. 17-A, §§ 1252.2D and 1301.3.E (1974), the maximum penalty is one year in prison and a $5,000 fine.

The state right to jury trial applies to all criminal offenses. *State* v. *Freeman*, 487 A.2d 1175, 1179 (Me. 1985).

MARYLAND

Under Md. Transp. Code Ann. §§ 27-101 and 21-902(k)(1) (1982), the maximum penalty is one year in prison and a $1,000 fine.

The state right to jury trial applies to criminal offenses punishable by more than 90 days' imprisonment. In *Fisher* v. *State*, 305 Md. 357, 366-369, 504 A.2d 626, 630-632 (1986), the court held that a DUI defendant was entitled to a jury trial because of the seriousness of the offense even though the prosecutor had agreed not to seek a

penalty of more than 90 days' imprisonment.

MASSACHUSETTS

Under Mass. Gen. L. ch. 90, §§ 21 and 24(1)(a)(1) (1985), the maximum penalty is two years' imprisonment and a $1,000 fine.

There is no state right to jury trial in the first instance for petty offenses. See *Opinion of the Justices*, 271 N.E.2d 335, 336-337 (Mass. 1971). Instead, Massachusetts uses a two-tiered system under which a jury trial may be obtained on appeal. See *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976).

MICHIGAN

Under Mich. Comp. Laws §§ 257.625(1) and (4) (Supp. 1988), the maximum penalty is 90 days' imprisonment and a $500 fine.

The state right to jury trial applies to all criminal offenses. *People* v. *Goodwin*, 69 Mich. App. 471, 472-474, 245 N.W.2d 96, 96-97 (1976).

MINNESOTA

Under Minn. Stat. §§ 169.121.1, 169.121.4(a), and 609.03(3) (1986), the maximum penalty is 90 days' imprisonment and a $700 fine.

The state constitutional right to jury trial applies to all criminal offenses. *Petersen* v. *Petersen,* 278 Minn. 275, 278-281, 153 N.W.2d 825, 828-830 (1967).

MISSISSIPPI

Under Miss. Code Ann. §§ 63-11-30(1) and (2)(a) (1973), the maximum penalty is one day in prison and a $500 fine.

The state right to jury trial applies, on demand, to petty offenses. *Clark* v. *State,* 332 So.2d 415, 416-417 (1976) (right to jury trial applies to any offense except criminal contempt).

MISSOURI

Under Mo. Rev. Stat. §§ 558.011.1(6), 560.016.1(2), 577.0101, and 577.010.2(1) (1979), the maximum penalty is six months' imprisonment and a $500 fine.

The state constitutional right to jury trial applies to all criminal offenses except violations of municipal ordinances. *State ex rel. Cole* v. *Nigro,* 471 S.W.2d 933, 936-937 (Mo. 1971). A state statute does, however, provide for jury trials in certain municipal courts. See Mo. Rev. Stat. § 479.130 (1987).

MONTANA

Under Mont. Code Ann. § 61-8-722 (1988), the maximum penalty is 10 days' imprisonment and a $500 fine.

The state right to jury trial applies to all criminal offenses. Mont. Code Ann. §§ 46-17-201 and 46-17-403 (1986).

NEBRASKA

Under Neb. Rev. Stat. §§ 39-669.07 and 28-106(1) (1984), the maximum penalty is seven days' imprisonment and a $200 fine.

The state right to jury trial applies to all criminal offenses. *State* v. *Karel,* 204 Neb. 573, 574-577, 284 N.W.2d 12, 13-14 (1979).

NEW HAMPSHIRE

Under N.H. Rev. Stat. Ann. §§ 265:82 and 265:82-b.I.(a) (1982 & Supp. 1987), the maximum penalty for the "violation" is a $1,000 fine. (By the decision of the state supreme court, see *infra,* the maximum penalty is a $500 fine.)

Contrary to petitioners' claim in the appendix to their brief, under New Hampshire law there is no right to jury trial for a DUI offense. The state supreme court

held in *State* v. *Morrill*, 465 A.2d 882, 884-886 (N.H. 1983), that the DUI offense was a "violation," not a crime, and thus there was no right to jury trial. The court also followed the *Baldwin* test and concluded that there was no federal constitutional right to trial by jury for a DUI offense (see *id.* at 884-885). The court reduced the maximum fine to $500, the limit under state practice for triggering a right to jury trial in civil cases (see *id.* at 885-886). Finally, the court pointed out that the legislature in 1973 had eliminated any right to jury trial on a de novo appeal from a conviction for a violation (see *id.* at 884).

NEW JERSEY	Under N.J. Rev. Stat. §§ 39:4-50(a) and (1) (Supp. 1988), the maximum penalty is 30 days' imprisonment and a $400 fine. The state right to jury trial does not apply to petty offenses such as DUI; an offense is deemed petty solely by the length of the potential sentence. *State* v. *Linnehan*, 197 N.J. Super. 41, 43-44, 484 A.2d 34, 35 (App. Div. 1984), cert. denied, 491 A.2d 723 (N.J. 1985).

NEW MEXICO	Under New Mex. Stat. Ann. §§ 66-8-102.A and .D (1988), the maximum penalty is 90 days' imprisonment and a $500 fine. There is no state right to jury trial for a DUI offense. *State* v. *Sweat*, 78 N.M. 512, 513-514, 433 P.2d 229, 230-231 (1967).
NEW YORK	Under N.Y. Veh. & Traf. Law §§ 1192.2 and .5 (McKinney 1986 & Supp. 1988), the maximum penalty is one year in prison and a $500 fine. In New York, the right to jury trial is determined by the length of the potential sentence, with the *Baldwin* bright-line test as the dividing line. *Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143, 153-154, 451 N.E.2d 150, 156 (1983).
NORTH CAROLINA	Under N.C. Gen. Stat. §§ 20-138.1(a) and 20-179(i) (1983), the maximum penalty is six months' imprisonment and a $500 fine. The state right to jury trial applies to all criminal offenses. *State* v. *Field*, 75 N.C. App. 647, 648, 331 S.E.2d 221, 222 (1985).

NORTH DAKOTA	Under N.D. Cent. Code §§ 39-08-01.1, 39-08-01.2, and 12.1-32-01 (1987), the maximum penalty is 30 days' imprisonment and a $500 fine. Contrary to petitioners' claim in the appendix to their brief, the state constitutional right to jury trial applies only to those cases triable to a jury when the state constitution was adopted in 1889. *In Interest of R.Z.*, 415 N.W.2d 486, 488 n.1 (N.D. 1987). There is no right to jury trial in municipal court, although a defendant can obtain a jury trial on appeal to the county court. *City of Bismarck* v. *Altevogt*, 353 N.W.2d 760, 764-766 (N.D. 1984).
OHIO	Under Ohio Rev. Code Ann. §§ 4511.99(A)(1) and 2929.21(B)(1) (Page's Supp. 1987), the maximum penalty is six months' imprisonment and a $1,000 fine. The state right to jury trial applies to all offenses punishable by imprisonment. *City of Lima* v. *Rambo*, 113 Ohio App. 158, 161-162, 177 N.E.2d 554, 555-556 (1960).

OKLAHOMA	Under Okla. Stat. tit. 47, §§ 11-902(A) and (C) (1988), the maximum penalty is one year in prison and a $1,000 fine. The state right to jury trial applies to all offenses punishable by imprisonment. *Murrah* v. *City of Oklahoma City*, 620 P.2d 1335, 1338 (Okla. Crim. App. 1980).
OREGON	Under Or. Rev. Stat. §§ 153.505., 153.615(2)(a), and 153.623(24) (1987), the maximum penalty for the "traffic infraction" is a $500 fine. Despite the legislature's treatment of DUI, the Oregon Supreme Court concluded that DUI retained aspects associated with crimes and thus a DUI charge must be tried to a jury, as would other state criminal offenses. *Brown* v. *Multnomah County District Court*, 280 Or. 95, 101-109, 570 P.2d 52, 55-60 (1977).
PENNSYLVANIA	Under 75 Pa. Cons. Stat. §§ 3731(a) and (e), 42 Pa. Cons. Stat. § 9721, and 18 Pa. Cons. Stat. §§ 1101(4) and 1104(2) (1982 & Supp. 1988), the maximum penalty is two years' imprisonment and a $5,000 fine.

Under state law an offense punishable by no more than six months' imprisonment does not require a jury trial. *Commonwealth* v. *Fischl,* 525 A.2d 775, 777 (Pa. Super. 1987).

RHODE ISLAND

Under R.I. Gen. Laws §§ 31-27-2(a) and (d)(1) (Supp. 1987), the maximum penalty is one year in prison and a $100 fine.

The state right to jury trial applies only to those offenses triable to a jury when the state constitution was adopted in 1842, namely, any offense that is "criminal" in nature. As a result, a person charged with a petty offense has a right to jury trial on appeal. *State* v. *Vinagro,* 433 A.2d 945, 946-947 (R.I. 1981).

SOUTH CAROLINA

Under S.C. Code Ann. §§ 56-5-2930 and 56-5-2940 (1) (Law. Co-op. Supp. 1987), the maximum penalty is 30 days' imprisonment and a $200 fine.

The state right to jury trial applies, on demand, to all criminal offenses. S. C. Code Ann. § 22-2-150 (Supp. 1987); see *United States* v. *Jenkins,* 780 F.2d 472, 474-475 (4th Cir. 1986).

SOUTH DAKOTA

Under S.D. Codified Laws Ann. §§ 32-23-1, 33-23-2, and

22-6-2(1)(Supp 1988), the maximum penalty is one year in prison and a $1,000 fine.

In *Parham* v. *Municipal Court,* 86 S.D. 531, 538, 199 N.W.2d 501, 505 (1972), the state supreme court held that the defendant, who was charged with DUI under a municipal ordinance, was entitled to a jury trial because the crime was "serious."

TENNESSEE

Under Tenn. Code Ann. §§ 55-10-401(a) and 55-10-403(a)(1) (Supp. 1987), the maximum penalty is imprisonment for 11 months and 29 days, and a $1,000 fine.

The state constitutional right to jury trial applies to all misdemeanor offenses. *State* v. *Morgan,* 598 S.W.2d 796, 797-798 (Tenn. Crim. App. 1979).

TEXAS

Under Tex. Traffic Reg. Code Ann. §§ 67011-1(b) and (c) (Vernon Supp. 1988), the maximum penalty is two years' imprisonment and a $2,000 fine.

The state right to jury trials applies to all criminal offenses.

	Franklin v. *State,* 576 S.W.2d 621, 623 (Tex. 1978).
UTAH	Under Utah Code Ann. §§ 41-6-44, 76-3-204, and 76-3-301 (1953 & Supp. 1987), the maximum penalty is six months' imprisonment and a $1,000 fine. The state right to jury trial applies to all criminal offenses, including those tried before nonrecord justice courts. See Utah Code Ann. §§ 78-46-5, 78-1-1, 78-5-1 (Supp. 1987).
VERMONT	Under Vt. Stat. Ann. tit. 23, §§ 1201(a) and 1210(b) (1987), the maximum penalty is one year in prison and a $750 fine. The state right to jury trial applies to all criminal offenses. *State* v. *Becker,* 130 Vt. 153, 154-155, 287 A.2d 580, 582 (1972).
VIRGINIA	Under Va. Code Ann. § 18.2-270 (1988), the maximum penalty is one year in prison and a $1,000 fine. Virginia does not recognize a state right to jury trial in the first instance for a petty offense, but one is obtainable on de novo ap-

	peal. *Manns* v. *Commonwealth,* 213 Va. 322, 323-324, 191 S.E.2d 810, 811-812 (1972).
WASHINGTON	Under Wash. Rev. Code §§ 46.61.502 and 46.61.515 (1970 & Supp. 1988), the maximum penalty is one year in prison and a $500 fine. The state right to jury trial applies to all criminal offenses. *City of Pasco* v. *Mace,* 98 Wash.2d 87, 99-100, 653 P.2d 618, 625 (1983).
WEST VIRGINIA	Under W.Va. Code §§ 17C-5-2 (d)(1) and (2) (Supp. 1988), the maximum penalty is six months' imprisonment and a $500 fine. The state constitutional right to jury trial applies to any offense punishable by imprisonment. *Scott* v. *McGhee,* 324 S.E.2d 710, 713 (W.Va. 1984).
WISCONSIN	Under Wis. Stat. §§ 346.63(1) and 346.65(2)(b) (Supp. 1987-1988), the maximum penalty is a $1,000 fine. The state right to jury trial applies to all criminal offenses. See *State* v. *Voss,* 34 Wis.2d 501, 149 N.W.2d 595 (1967).

WYOMING	Under Wyo. Stat. §§ 31-5-233(a) and (d) (Supp. 1987), the maximum penalty is six months' imprisonment and a $750 fine. The state constitutional right to jury trial applies to any offense punishable by imprisonment. *Brenner* v. *City of Casper*, 723 P.2d 558, 561 (Wyo. 1986). The state supreme court also recently held that a municipality that had eliminated imprisonment as a penalty for DUI must still provide a jury trial because the offense was "serious." *City of Casper* v. *Cheatam*, 739 P.2d 1222, 1223-1224 (Wyo. 1987).